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In The

Supreme Court of the United States

October Term, 1937

No. 41

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, for the use and benefit of L. R. POWELL, JR., and HENRY W. ANDERSON, as Receivers, Etc.,
Respondent.

On Writ of Certiorari to The United States Circuit Court of Appeals for The Fifth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

PETITIONER'S STATEMENT OF THE CASE IS DEEMED SUFFICIENT.

ARGUMENT

It is our contention that freight charges of a railway company for transporting materials used in the prosecution of the work provided for in a United States construction contract, which charges are incurred by the contractor for such work, are within the obligation of the contractor's bond conditioned, conformably to the statute, (Section 270, Title 40, U. S. C. A.) to "make payments to all persons supplying the principal with labor and materials in the prosecution of the work."

Although not subdivided, the argument contained in petitioner's brief advances two distinct reasons to support the contention therein made. One is that a railroad, in transporting materials for a contractor to be used and actually used in a public building, has not supplied the contractor with "labor and materials" in the prosecution of the work, within the meaning of the statute herein involved and of a contractor's bond conditioned conformably thereto. The other is that common carriers, because of their common law lien for their charges which could be enforced by retention and sale of the materials transported, had sufficient protection, and therefore Congress must not have intended to embrace them within the protective purpose of the act.

The petitioner's demurrer, (R. 21) upon which the judgment here to be reviewed was entered, seems to advance, by the grounds therein contained, only the first of these two reasons assigned in its brief. We shall, however, for the purpose of our agrument, take it that both questions suggested are before this Court for decision.

There is nothing novel in either of these reasons. They both argue for the principle of a strict construction of the statute and bond, such as was originally adopted but has now been repudiated by the Fifth Circuit Court of Appeals. In that Court's opinion in the instant case it announces its adherence to the principle of "a broad and liberal construction of the statute and bond" executed pursuant thereto. The Court determined the case at bar in favor of the respondent carrier by the application to it of that principle.

> "Its (referring to the appellant and petitioner here) argument brings forward all the reasons advanced, in the cases it relies on, for a strict construction of the bond, and a denial to common carriers of

its protection. These reasons, particularly the existence of the carrier's lien and the indirectness of its claim of furnishing, were all examined and rejected in the City of Stuart case, and the cases cited in it, and in later decided cases affirming and approving it. * * * * In addition to the cases it cites, attention may be called to the following cases, either citing it with approval or announcing adherence to the same principle, a broad and liberal construction of the statute and bond." (Citing a number of cases).

It is admitted in petitioner's brief that this Court is committed to a liberal construction of the act and the bonds given under it for the protection of those who furnish labor or materials in the prosecution of public work. An excerpt from its opinion in the case of *Brogan v. National Surety Co.*, 246 U. S., 257; 38 S. Ct. 250; 62 L. Ed., 703, one of the cases cited in petitioner's brief, will suffice for illustration.

> "In *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376; 61 L. Ed., 1206; 37 Sup. Ct. Rep. 614, recovery was allowed not only for the rental of cars, track, and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment, and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work."

It seems to us that if the position taken by the Fifth Circuit Court of Appeals is correct, i.e.—that application of this principle of liberal construction to the case at bar necessitates a decision in respondent's favor, and we submit that it is correct, then this Court has already, in effect, passed upon the question before it. That the reasons urged by the petitioner in support of its position are, in reality,

merely reasons for a strict construction of the bond, was also held by the Fifth Circuit Court of Appeals in its opinion in the case above referred to of *City of Stuart for use of Fla. E. C. Ry. Co. v. American Surety Co.*, 38 Fed. (2d) 193, wherein it impliedly overruled its earlier (1899) decision in the case of *U. S. v. Hyatt*, 92 Fed., 442, and first departed from its holding therein. From its opinion in the City of Stuart case:

> "The decisions of the Supreme Court reject the theory of strict construction, and adopt that of liberal construction in the allowance of claims above alluded to. *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 37 S. Ct., 614, 61 L. Ed. 1206; *U. S. Fidelity & Gty. Co. v. U. S.*, 231 U. S. 237, 34 S. Ct. 88, 58 L. Ed. 200; *Brogan v. National Surety Co.*, 246 U. S. 257, 38 S. Ct. 250, 62 L. Ed. 703, L. R. A. 1918D, 776. So do the above cited Florida decisions."

The Florida statute before the Court in that case was there held to be an adoption of the United States statute on the subject.

Reverting to the two reasons above stated, we shall proceed to discuss the first.

It is the first sentence of petitioner's brief that assigns this reason and it is left to stand with little or no supporting argument. This sentence paraphrases the language of the Third Circuit Court of Appeal's opinion in *Mandel v. U. S. to Use of Wharton & N. R. Co.*, 4 Fed. (2d), 629, and reads:

> "On reason and principle 'freight' cannot be considered 'labor and materials' without doing violence by judicial construction to the plain terms of the statute and bond, and the Court should not depart from the language used and read an additional term into the bond, not justified by the language used and the circumstances of the giving of the bond."

The Mandel case is the only one we have found holding that the word *labor* is a "plain word of well-understood meaning, and in the common use and acceptance" freight is not described or embraced by it. The opinion therein cites the case of U. S. v. Hyatt, *supra,* (and that case alone) as authority for its statement that "Congress could not have intended to include in the term 'labor', as used in this act, the freight charges of a railroad on materials carried by it," but not for its restrictive definition of the word "labor." We may consider this statement as obiter dicta because, having excluded such transportation from the well-understood meaning of the word *labor,* there was no occasion for deciding that Congress did not intend to include the transportation in the term labor, as used in the act, because it was too remote. It was held in the Hyatt case only that "The labor which Congress intended to protect, by the act under discussion, is evidently labor used directly upon the public work, claims for which would be made by the laborers primarily against the work; thus impeding, possibly, the prosecution of the work and hampering the government officers."

Now, quoting from the opinion in the City of Stuart case, *supra*:

> "Nor is the nature of the work done in transportation such as to prevent its being labor. Much of what is done by the agents of the railroad company is hard labor, and the doing of the work, even by the use of machines, is recognized as labor under the statute. *Fulghum v. Florida,* 92 Fla. 662, 109 So. 644. Transportation of materials by cart and towboat is uniformly allowed as labor. *United States Fidelity & Guaranty Co. v. United States,* 231 U. S. 237, 34 S. Ct. 88, 58 L. Ed. 200; *Title Guaranty & Trust Co. v. Crane Co.,* 219 U. S. at page 34, 31 S. Ct. 140, 55 L. Ed. 72. In what way can the distance of the trans-

portation or the fact that it is over a specially prepared rail track make it any the less labor?"

Assuming then, and we are confident that this Court will so hold, that the transportation of materials is labor, the first reason advanced by petitioner must fall back upon the question whether the statute contemplates only labor applied *directly* in the prosecution of the work.

The Court of Appeals below refers in its opinion to "the indirectness" of the carrier's claim of furnishing, as being one of the reasons brought forward by the petitioner's argument before it.

Petitioner is here supported by the Hyatt case, (no authorities whatever are cited in the opinion therein) dicta in the case of *American Surety Company v. Lawrenceville Cement Company,* 110 Fed., 717, (supported by no citations) and the decision of the Ninth Circuit Court of Appeals in the case of *Title Guaranty and Trust Co. v. Puget Sound Engine Works,* 163 Fed. 168, which cites with approval the dicta in the preceding case, but no other authority. We find no other cases supporting this contention.

Against these cases we have the following expression of this Court which, we think, alone sufficiently decides the point and fixes the rule. It is found in *Brogan v. National Surety Co.,* 246 U. S., 257, 38 S. Ct. 250, 62 L. Ed. 703, L. R. A. 1918D, 776, and reads: "This Court has repeatedly refused to limit the application of the act to labor and materials *directly* (italics ours) incorporated into the public work." The Supreme Court of Delaware agrees with us for in the recent (1929) case of *State for use of Penn. R. Co. v. Aetna Casualty & Surety Co.,* 145 A. 172, it quotes this same language, followed immediately by the observation, "Though authority may be found to the contrary, yet we think the modern cases are in harmony with the rule thus indicated as settled in the

Supreme Court of the United States." Although this Delaware case involves the statute of that state it is pointed out in the opinion therein that the parties conceded that no difference existed between this statute and the federal statute. The opinion in this case, which is on all fours with the case at bar, contains the most exhaustive and analytical discussion of the entire subject before this Court for decision and the most extensive review of the authorities of any case we have found. The defendant surety's argument there covered the same points as the petitioner's argument in the instant case and one other and it was completely met and refuted.

In the case at bar the materials were consigned and the labor in transporting them was furnished by the use respondents directly to the contractor. (R. 2). A statement on page 5 of petitioner's brief seems to infer that this Court, in holding for a liberal construction of the bond and allowing claims for labor and materials furnished indirectly to the job, had applied the rule only in the instance where the furnishing was to subcontractors rather than directly to the contractor. Such was the situation in the case cited, *U. S. for the use of Hill v. American Surety Co.*, 200 U. S., 197, 50 L. Ed. 437, 26 Sup. Ct. Rep. 168. It was not the situation in the Brogan case above mentioned nor in several of the former decisions of this Court cited by Mr. Justice Brandeis in writing the Court's opinion in that case, for no subcontractors were there involved. It is quite plain that this Court, by use of the word "directly" in the above quoted excerpt from its opinion in the Brogan case, could only have meant "directly" in the sense of proximately contributing to the construction. The following illustration was given in the opinion:

> "The supplies furnished by Brogan under these circumstances were clearly used in the prosecution of

the work, just as supplies furnished for the soldiers' mess are used in the prosecution of war. In each case the relation of food to the work in hand is proximate."

The surety there contended that labor and materials which contribute to construction only indirectly should be excluded. The opinion also cites, for example, *Title Guaranty & T. Co. v. Crane Co.*, 219 U. S. 34, 55 L. Ed. 72, 31 Sup. Ct. Rep. 140, where the claims for which recovery was allowed under the bond included labor by way of cartage and towage of material and *United States Fidelity & Guaranty Co. v. United States*, 231 U. S. 237, 58 L. Ed. 200, 34 Sup. Ct. Rep. 88:

> "where the work contracted for was building a breakwater, recovery was allowed for all the labor at a quarry opened 50 miles away. This included, as the record shows, the labor not only of men who stripped the earth to get at the stone and who removed the debris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment, and who repaired the tracks upon which the cars moved. And the claims allowed included also the wages of stablemen who fed and drove the horses which moved the cars on those tracks."

In applying the rule thus laid down by this Court to the claim of the respondent in the case at bar, we could not improve upon the reasoning or the expression thereof by the Delaware Supreme Court in its opinion in the case above commented upon of *State for use of Penn. R. Co. v. Aetna Casualty & Surety Co.*, 145 A. 172. Immediately after the above quoted reference in this opinion to this Court's decision in the Brogan case:

> "Reason harmonizes with this result for, taking the particular case in hand as an illustration, the labor of transporting slag to be used in the construction of the road contributed as materially and substantially

to the work's completion as did the labor of dumping, hauling, mixing and spreading it on the ground. The latter is impossible in the absence of the former. There would be as much reason in excluding the one from the term 'labor' performed on the work as the other. It does not seem to us that the services rendered to a contractor can be made to depend on the mere circumstance of the place where rendered for its admission into the category of labor performed in the prosecution of the work. They ought rather to depend on the nature of the services and whether they have in a proximate sense contributed to the work's prosecution and completion.

"With that as the test, labor and materials have been held as not too remote under the circumstances referred to in the cases above cited. That transportation of materials for a contractor in order that he might have them on hand for incorporation in the work is the performing of labor within the meaning of the statute and the bond has been specifically held in Title Guaranty & Trust Co. v. Crane Co., supra, where a claim for cartage and towage was allowed, as well as the claim for drawings and patterns before referred to. In American Surety Co. v. Lawrenceville Cement Co. (C. C.) 110 F. 717, it was held that claims for transportation in the form of trucking and water carriage are within the term 'labor' as used in the statute. And it is to be noted that in some of the cases above cited, labor and materials which were merely collateral to the labor of transporting were allowed, as for instance rent of derricks, lighters and scows.

"It being once granted, as we think under the authorities it must, that services rendered to or for a contractor that bear a proximate relation to the work and materially contribute to its progress and completion, are within the protection of the statute, there can be no satisfactory ground upon which to exclude from it that particular type of proximately contributing work embraced in the descriptive term 'transporta-

tion.' The cases last cited find nothing peculiar in the work of transporting materials which should differentiate it from other classes of work. Nor can we think of any differentiating peculiarity in that sort of work.

"We lay it down therefore as a general proposition that the labor of transporting materials for a contractor to be used and actually used in the work he has engaged to do, comes within the meaning of the term 'labor' as used in such statutes as the one before us.

"Before leaving this branch of the case we pause to observe that in the Lawrenceville Cement Company Case, last cited, though a charge for transportation was allowed, yet a distinction was suggested between labor expended in transporting for a long distance and labor expended in transporting for a short one. This distinction we are unable to accept. It seems to us to discard as a test the essential thing of proximateness to the work's advancement and to substitute therefor the purely irrelevant circumstance of length of distance over which the transportation extends. Length of the haul, upon analysis, can mean only length in time for doing the labor of transporting. No one, however, has ever suggested that the recoverability of a claim for labor ought in any way to depend upon the length of time spent in rendering it. Furthermore, if a distinction is to be drawn between a long haul and a short haul, where is the line of demarcation between the two? We confess that we do not know to what principle of reason resort ought to be had for guidance if distance of the haul is to be accepted as the test of whether it is 'labor' within the statute or not. In U. S., to use of Wharton, etc., R. R. Co. v. Columbus Circle Construction Corp. et al (D. C.) 284 F. 155, the distinction based on the length of the haul was rejected and we think rightly so. The opinion reversing that case in Mandel et al v. U. S., to use of Wharton, etc. R. R. Co. et al 4 F. (2d) 629, left the ruling on the long and short haul distinction untouched, because

under the view taken by the Circuit Court of Appeals it was unnecessary to notice it."

In rejecting the distinction based upon the length of the haul, the New Jersey District Court, in U. S., etc. v. Columbus Circle Constr. Corp., cited above by the Delaware Court, says:

> "but, if it be said that his (referring to Judge Putnam in deciding American Surety Co. v. Lawrenceville Cement Co., also cited above by the Delaware Court) determination did not rest upon the lien theory then the determination must depend on whether the labor was in a long haul or a short haul. If a person hauled goods one mile, it might be labor. If he hauled for 100 miles, it would be something else, or a truck driver bringing material for a distance of 100 miles might be entitled to a lien, and a railroad corporation hauling for 90 miles might not. The law is not so jumpy."

We now pass to a consideration of the second reason advanced by petitioner in support of its position, in the words of the Delaware Supreme Court in its opinion aforesaid:

> "Having arrived at the conclusion that labor, rendered in the transportation for the contractor of materials to be used and actually used by him in the construction of the work covered by his contract, is labor performed within the meaning of the statute and of the bond, and that this is so without regard to the length of the haul, we next turn to the question of whether there is anything peculiar to the situation of a common carrier which ought to take the transportation labor performed by it out of the protection which the general category of transportation services is entitled to enjoy.
>
> "Second, then, is a common carrier, because of anything peculiar to its situation, to be denied the benefit

of the statute? The only ground upon which the suggestion rests that a common carrier is to be differentiated from other types of transporters is that it has a common law lien for its charges whereas others have not."

We refrain from continuing here to quote from this opinion only because the Court may prefer to read from the book and because we have possibly already quoted too copiously from it. All that is said therein is applicable to the argument made in petitioner's brief. The Delaware Court proceeds to point out that what the Fifth Circuit Court of Appeals said in the Hyatt case (the opinion was written before the Hyatt case was overruled) and what the Third Circuit Court of Appeals said in the Mandel case concerning the exclusion of common carriers claims for freight by reason of their lien, could, in each instance, be considered obiter dicta, because these decisions were based upon the views of those Courts that transportation services of a carrier railroad were not labor within the meaning of the statute and bonds, and there was therefore no occasion to discuss the effect upon the claimants' status of the liens which they had. The Hyatt case is further criticized because the holding therein regarding the effect of the carrier's lien was inconsistent with the purpose which the Fifth Circuit Court of Appeals therein imputed to the act, i.e.—to afford such protection that, but for its presence, the prosecution of the work would be impeded and the government officers hampered by refusal of labor or material men to do business with the contractor. The Delaware Court says:

"If common carriers are to be denied this assurance because they have a common law lien will not the result be that materials, necessary for the orderly progress of the work, will be either withheld or often times delayed in delivery, and the state's desire for unimpeded

operation be frustrated? * * * the view of the courts, in adopting the rule of liberal construction seems to be that such acts as these are not grounded, like mechanics' lien statutes, in equitable considerations in favor of claimants, for which reason the rule of liberality of construction prevails. In other words, the protection of claimants would appear to be subsidiary to a purpose broader in scope than the mere securing of payment to them, that purpose being the facilitating of the work's uninterrupted progress to completion. Looking therefore at this purpose which, as much as any other purpose, the act may be said in a substantial sense to have been designed to serve, it would appear that there is more reason to include carriers who have a lien for freight within its protection than to exclude them."

The dicta of Judge Putnam in *American Surety Co. v. Lawrenceville Cement Co.,* 110 Fed., 417, which was quoted, but not approved, by this Court in the case of *Title Guaranty & Trs. Co. v. Crane,* 219 U. S., 23; 31 S. Ct. 140; 55 L. Ed. 72, and which refers to "defeat" of "the practical operation of the statute" and of "the beneficial purpose of the statute, and the practical ends which it is intended to accomplish," is subjected by the Delaware Court to this same criticism for inconsistency.

Petitioner's brief calls attention to the title of the act in question here as originally passed, which was "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works." The Act was passed in 1894. It was amended in 1905 to read substantially as it appeared in 1933, when the bond here involved was executed and the freight charges here in suit were incurred. (The appendix to petitioner's brief contains full references to the statutes so we will not set them out here.) By the 1905 amendment the following significant clause was inserted, indicating clearly that the

Congress thereby recognized the dual purpose of the bonds required, that is that they were to be performance bonds as well as for the protection of laborers and material men:

> "and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials" etc.

Indeed, since the United States is, by this amendment, given priority for its claims over those of laborers and material men the primary purpose of the act, as so amended, might be said to be the assurance of the completion of the contract.

This amendment is referred to by this Court in its opinion in *United States to use of Hills v. American Surety Co., supra,* as being a material one in that, among other things, it provides for preference in payment in favor of the United States, although, in respect to the class of persons entitled to the benefit of the bond, no material change in the original act was effected thereby. Also referring to this amendment, the Court, in the Brogan case, *supra,* says:

"But the change in phraseology is not significant. The purpose of the amendment was merely to secure to the United States preference over others in the satisfaction of its claim against the contractor."

As thus inferred the duel purpose of the act, even before its amendment, was recognized by this Court, for in the case of *United States Fidelity & Guaranty Co. v. United States,* 204 U. S., 349, 51 L. Ed., 516, (bond given in 1899) it was held that the United States was a real, and not a mere nominal or formal plaintiff in suits by laborers and materialmen upon bonds given under the act, that it had the legal right, was a principal party to the contract and had an interest in the performance of all its provisions. From the Court's opinion:

"It may be that the interests of the government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies with certainty and promptly. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the government would exert its power directly for their protection." (The claim in suit was by a furnisher of materials).

The provisions of the bond in suit in that case other than the one that the contractor should promptly make payments to all persons supplying labor and materials in the prosecution of the work, were referred to in this opinion as the "main provisions." In *United States Fidelity & Guaranty Co. v. Golden Pressed Brick Co.,* 191 U. S, 416, 24 Sup. Ct. Rep., 142, 48 L. Ed., 242, it was held that the two covenants of the bond, i.e., for the performance of the contract and for payment to laborers and materialmen should, "of course, be read together, and the latter interpreted in the light of the former." And that case was decided before the 1905 amendment. The influence which

the title of an act of Congress ought to have in construing the enacting clauses was limited by this Court in an early decision, *United States v. Fisher,* (1804) 2 Cranch, 358, 386, 2 L. Ed. 304, 313, which has been followed ever since. The title cannot control plain words in the body of the statute, it may only assist in removing ambiguities.

> "Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

Although petitioner invokes the title of the act in question in this case, it inconsistently refers repeatedly in its brief to the plain words of the act and bond and urges that the courts below extended the language thereof by judicial construction to include respondent's claim. The Fifth Circuit Court of Appeals certainly did not consider that it enlarged the terms of the act involved in the City of Stuart case, *supra,* by construing it to include the carrier's claim, for it there says:

> "we find in the statute no reference to liens. Protection is expressly extended to *all persons* who furnish the named things, whether under lien or not, whether individual or corporation, rich or poor, etc."

And the Delaware Court, in its opinion hereinbefore quoted, says:

> "In the Mandel Case, the court after saying that transportation charges by a carrier are not within the term 'labor', then proceeds to say that 'there is no call for the exercise of judicial construction' to include carriers within the statutory bond because of the lien they possess. This seems to us to be approaching the matter from the wrong end. It would rather seem

to be more proper to say—the act embracing transportation services generally (as we think must be said under the authorities) is there anything in the situation of a transporter who happens to be able to assert a lien that excepts him from its protection? The inquiry should be, not is the act to be extended to a common carrier but, his class being generally included in it, is there anything peculiar to his situation that should exclude him from it?

As we have said, we can see nothing in the intent or purpose of the act upon which to base his exclusion."

In only one case decided by this Court do we find any reference to the objection to carriers' claims under bonds such as the one here involved because of their liens. That case is *Title Guaranty & Trust Co. v. Crane,* 219 U. S. 24, 55 L. Ed. 72, 31 Sup. Ct. Rep. 140, and it is cited in petitioner's brief (page 7) with an excerpt from the opinion containing the reference. We do not see how petitioner's comments concerning the reasoning of the Court evidenced in the excerpt quoted can be justified. The claims in controversy were allowed. The objection to them was merely noted, not approved. The reference to Judge Putnam's opinion in the case of *American Surety Co. v. Lawrenceville Cement Co.,* 110 Fed. 717, was obviously for the sole purpose of showing that the objection, *even if valid,* was not applicable to the claims under consideration. As hereinbefore stated, Judge Putnam's remarks concerning the carrier's lien were clearly dicta although they were the only authority cited by the Ninth Circuit Court of Appeals for its denial of a claim by a carter for freight money advanced to carriers and added to the cartage bill. *Title Guaranty & Trust Co. v. Puget Sound Engine Works, supra.* The carter, the court said, was "not a common carrier, protected by its lien on freight carried, but was a local transfer company engaged in the business of cart-

age and delivering." Its claim for its own services was allowed. Yet Judge Putnam's remarks, cited and approved as the basis for this decision, were apropos "some minor claims for transportation" consisting of trucking materials from a place of landing to the exact locality of the work under contract and to water carriage "for short distances without the aid of steam or a fully-equipped vessel," and were occasioned by his view, at odds with that of the Ninth Circuit Court of Appeals, that "every person engaged in transportation, who is not a mere servant of the owner of the merchandise transported, holds a carrier's lien, even though the carriage is of miscellaneous parcels, over short distances in the immediate locality, and at frequent, irregular intervals." The claims in controversy were allowed. The remarks relating to "transportation for considerable distances in the regular course, by the ordinary lines of either steam, sail, or rail * * * especially under an ordinary bill of lading, or its equivalent," are expressly an "illustrative suggestion." We have covered the first reason suggested by Judge Putnam for disallowance of claims for such carriage, i.e., that the service was too remote. The second reason he assigned, that such carriage creates a well recognized lien for freight, is advanced only to illustrate the view that it would be inequitable to allow the carrier to give up his cargo and enforce his claim against the surety, after he has so placed himself that the surety cannot be subrogated to the security which the law gave. This view is not urged by petitioner in the case at bar. Judge Putnam makes no reference to the fact of the carrier's lien excluding common carriers' claims for freight because Congress intended to protect only those persons who would, except for the statute, have no protection. That is the contention of petitioner here. The objection founded on the existence of the lien which Judge Putnam suggests was disposed of in this manner by the Fifth Circuit Court

of Appeals in the City of Stuart case, *supra.* After citing the case of *State of Delaware v. Aetna Casualty & Surety Co.,* 145 A. 175:

> "The claim that the surety is unjustly prejudiced by the surrendering of the carrier's lien is there fully examined and exploded. Additionally it may be remarked that the carrier's lien could not be of advantage to the surety by way of subrogation. If by payment he can be subrogated, he could enforce it only against the materials transported, thus keeping them out of the job. Yet the first and most important obligation of the bond is that the material shall be furnished, and the work done, according to the contract. If the materials whose transportation is not paid for are sold, either by the carrier or the surety, in order to satisfy the charges on them, the surety would still be bound to see that they were replaced by other material whose transportation would again have to be paid for. The broad obligation, assumed in the bond, that the contract shall be completed, results in all liens for labor and material being practically unimportant to the surety, except to see that they do not prevent the execution of the work."

We have devoted this considerable space to our criticism of this decision because petitioner construes its citation by this Court as an approval which, under the circumstances, we are sure it was not intended to be.

In *Wisconsin Brick Co. v. National Surety Co.,* 164 Wis., 585, 160 N. W. 1044, cited by petitioner, the Wisconsin Supreme Court construed the statute of that state covering the subject very strictly to give no more extensive remedy than that furnished by the mechanics' lien law, nor to give a remedy to any different classes of persons, stating that there was "every indication that the remedy was intended to be coextensive with the mechanic's lien remedy." The peculiar circumstances evidencing such an intent are

set forth in the opinion. That the situation was unique is evidenced by the failure of the Court to cite a single authority, although (in 1917) there was ample authority construing the federal and other state statutes of similar purpose.

As against the statements, which we believe we may consider dicta, in the Hyatt and Mandel cases, that which is unquestionably dicta in the American Surety Company v. Lawrenceville Cement Co. case, *supra,* and the holding in the Title Guaranty & Trust Co. v. Puget Sound Engine Works case, *supra,* which was also based upon the view that the service was too remote, which view, if valid, would obviate the necessity of giving consideration to the carrier's lien, we have the present holding of the Fifth Circuit Court of Appeals which is backed by clear and cogent reasoning, the Delaware case from which we have quoted so copiously because of the argument contained in the opinion, and the several decisions of this court hereinabove cited which adopt the rule of liberal construction and to our minds clearly indicate what its consistent decision in the instant case must be. The Fifth Circuit Court of Appeals says in the City of Stuart case, *supra*:

> "It was held in Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 S. Ct. 614, 61 L. Ed. 1206, that, where track and cars and equipment were rented by the contractor, and used by him in transportation for the job, the rental was protected by the bond. If he should charter a railroad or a train, the railroad company could, under this decision, recover. Why not when it furnishes single cars? By all the cases, when a furnisher of material pays the freight, whether bound to do so or because the contractor does not pay, the freight is added to the cost of the material, and protected. See Maryland Casualty Co. v. Ohio River Gravel Co. (C. C. A.) 20 F. (2d) 514. The same 'place value' is given the material by the transporta-

tion, no matter who pays the freight, and to the same extent is material furnished."

In the case of Maryland Casualty Co. v. Ohio River Gravel Co. cited in the above excerpt, the Fourth Circuit Court of Appeals held that it would "be both unjust and absurd" to hold that the claimant could recover only the value of materials sold the contractor at the point of shipment, when he had advanced the freight to the job and "in effect furnished the material at the place of use by paying the freight charges and having it transported there." The Court said, "And we think that whether the freight was paid in advance under agreement, or whether exacted of claimant under its liability as consignor, makes no difference." Although the Court distinguished the situation before it from that where a common carrier itself is the claimant; how unreasonable it would be to say that the carrier as well could not look to the surety for payment. To the same effect as this case is *U. S. v. Morgan*, 111 Fed. 474. One of the cases cited by the Circuit Court of Appeals for the Fifth Circuit in its opinion below is *United States v. Hercules Co.*, 52 Fed. (2d) 451, wherein Judge Holmes, then District Judge, wrote a particularly well considered opinion.

CONCLUSION

It is respectfully submitted that petitioner has advanced no valid reason why common carriers should be excluded from the benefits of the statute in question when many persons who have a lien enforceable by retention have been held to be within its provisions. That the true purpose of the statute is to minimize impediment and delay of government construction work, and facilitate procurement of labor and materials, through the security afforded by the bond required, as well as to protect the honest claims of those who have contributed to the per-

formance of the work. If the carrier is included in its benefits, this intent will be served. If he is not included, he must hold the freight until payment is made, and sell it for charges if it is not, to the embarrassment of the work.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 41.—October Term, 1937.

Standard Accident Insurance Company, Petitioner,
vs.
The United States of America for the Use and Benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers, etc.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 3, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

The petitioner is surety on a post office construction bond given pursuant to the Act of Congress approved August 13, 1894, (c. 280, 28 Stat. 278,) as amended, (Title 40 U. S. C. A. Sec. 270,) which provides—

> "Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. . . ."

Respondent, common carrier by railroad, having transported material for the structure, sued on the bond to recover freight charges and prevailed in both courts below. They held it was "a corporation who has furnished labor or material used in the construction" of a public building. The correctness of this conclusion is the only question before us.

The cause is here because of conflicting opinions in Circuit Courts of Appeals. *United States, etc.*, v. *Hyatt*, 92 Fed. 442; *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works*, 163 Fed. 168; *Mandel et al.*, v. *United States, etc.*, 4 F. (2d) 629; *Maryland Casualty Co.* v. *Ohio River Gravel Co.*, 20 F. (2d) 514; *City of Stuart* v. *American Surety Co.*, 38 F. (2d) 193; *Standard Accident Insurance Co.* v. *United States, etc.*, 89 F. (2d) 658.

Petitioner maintains that freight cannot be considered as "labor or material" without doing violence to the words of the statute; also that Congress did not intend to extend further protection to carriers who could enforce their lien for charges by retaining and selling the materials.

City of Stuart v. *American Surety Co.*, Circuit Court of Appeals Fifth Circuit (1930), *supra*, carefully considered and denied these defenses and stated reasons therefor which we deem adequate. This was followed by the court below in present cause.

The statute often has been before us. *Guaranty Company* v. *Pressed Brick Co.*, 191 U. S. 416; *United States, etc.*, v. *American Surety Co. of New York*, 200 U. S. 197, 201; *Title Guaranty & Trust Co.* v. *Crane Company*, 219 U. S. 24; *United States Fidelity & Guaranty Co.* v. *United States, etc.*, 231 U. S. 237; *Equitable Surety Co.* v. *United States, etc.*, 234 U. S. 448, 456; *Illinois Surety Co.* v. *The John Davis Co.*, 244 U. S. 376, 383; *Brogan* v. *National Surety Co.*, 246 U. S. 257, 262. And we are committed to the doctrine that it should be liberally construed in aid of the evident public object—security to those who contribute labor or material for public works.

Certainly labor is required for loading freight on railroad cars, moving these over the road, and unloading at destination. A carrier who has procured the doing of all this in respect of material has "furnished labor". If a contractor had employed men to move the same kind of material in wheelbarrows, there could be no doubt that he furnished labor. In principle the mere use of cars and track and a longer haul creates no materially different situation.

Nor do we find reason for excluding the carrier from the benefit of the bond because it might have enforced payment by withholding delivery. The words of the enactment are broad enough to include a carrier with a lien. Nothing in its purpose requires exclusion of a railroad. Refusal by the carrier to deliver material until all charges were paid might seriously impede the progress of public works, possibly frustrate an important undertaking.

State, etc., v. *Aetna Casualty & Surety Co.* (1929)—Delaware—145 Atl. Rep. 172, gave much consideration to a similar statute. The conclusion there reached accords with our view.

The judgment of the court below must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.